Supreme Court U.S.
FILED
JAN 15 2003
OFFICE OF THE CLERK

No. 02-751

IN THE

Supreme Court of the United States

SUN PRAIRIE, A PARTNERSHIP,

Petitioner,

v.

NEAL A. McCALEB, ASSISTANT SECRETARY – INDIAN AFFAIRS, GALE A. NORTON, SECRETARY OF THE INTERIOR, ROSEBUD SIOUX TRIBE, CONCERNED ROSEBUD AREA CITIZENS, SOUTH DAKOTA PEACE AND JUSTICE CENTER, PRAIRIE HILLS AUDUBON SOCIETY, and HUMANE FARMING ASSOCIATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT ROSEBUD SIOUX TRIBE

TERRY L. PECHOTA
VIKEN, VIKEN, PECHOTA, LEACH, AND DEWELL
1617 Sheridan Lake Road
Rapid City, SD 57702
(605) 341-4400

Attorney for Respondent Rosebud Sioux Tribe

178400

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

An Indian tribe may lease land to a non-Indian party with the approval of the Secretary of the Interior or her designee pursuant to 25 U.S.C. § 415. The Secretary of the Interior must likewise approve any agreement that encumbers Indian lands for that agreement to be valid under 25 U.S.C. § 81. The question presented is:

> Once a lease of Indian lands to a non-Indian party has received federal approval under 25 U.S.C. §§ 81 and 415, but that party knew or should have known that the approval was likely to be revoked, does that non-Indian party have prudential standing to challenge a federal agency's withdrawal of approval.

TABLE OF CONTENTS

Page

Question Presented i

Table of Contents ii

Table of Cited Authorities iii

Statement of the Case 1

I. This Case Does Not Invoke Any Question Of Fundamental Importance To The Development Of Tribal Trust Land. 9

II. The Eighth Circuit's Decision Does Not Conflict With This Court's Precedent. 13

Reasons for Denying the Petition 16

Conclusion 17

TABLE OF CITED AUTHORITIES

Page

Cases:

Baltimore Gas & Electric Co. v. Natural Resources Defense Council, 462 U.S. 87 (1983) 2

Bobula v. United States Department of Justice, 970 F.2d 854 (Fed. Cir. 1992) 12-13

Brown v. United States, 86 F.3d 1554 (Fed. Cir. 1996) 10-11

Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831) 9-10

Davis v. Morton, 496 F.2d 593 (10th Cir. 1972) ... 14

Hornell Brewing Company v. Rosebud Sioux Tribal Court, 133 F.3d 1087 (8th Cir. 1998) 12

In the Matter of the Estate of Crazy Horse v. Heileman Brewing Company, 23 Indian L. Rptr. 6104 (1996) 12

Juidice v. Vale, 430 U.S. 327 (1977) 14

Lewis v. Casey, 518 U.S. 343 (1996) 14

Manygoats v. Kleppe, 558 F.2d 556 (10th Cir. 1977) 14

Mitchell v. United States, 445 U.S. 535 (1980) 10

Cited Authorities

	Page
Morton v. Ruiz, 415 U.S. 199 (1974)	10
Navajo Nation v. United States, 263 F.3d 1325 (Fed. Cir. 2001)	10, 15
Navajo Tribe v. United States, 364 U.S. 320 (Ct. Cl. 1966)	10
O'Shea v. Littleton, 414 U.S. 488 (1974)	14
Rosebud Sioux Tribe v. A & P Steel, Inc., 874 F.2d 550 (8th Cir. 1989)	12
Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977)	1
Rosebud Sioux Tribe v. United States, 714 F. Supp. 1546 (D.S.D. 1989)	1
Rosebud Sioux Tribe v. Val-U Construction Company, 50 F.3d 560 (8th Cir. 1995)	12
San Xavier Dev. Auth. v. Charles, 237 F.3d 1149 (9th Cir. 2001)	15
Schmit v. Int'l. Finance Mgmt. Co., 980 F.2d 498 (8th Cir. 1992)	15
Seminole Nation v. United States, 316 U.S. 286 (1942)	10

Cited Authorities

	Page
South Dakota v. Andrus, 614 F.2d 1190 (8th Cir. 1980)	2
United States v. Hays, 515 U.S. 737 (1995)	14
United States v. Mason, 412 U.S. 391 (1973)	10
United States v. Mitchell, 463 U.S. 206 (1983)	10
W. Shoshone Bus. Council v. Babbitt, 1 F.3d 1052 (10th Cir. 1993)	15
Webster v. United States, 823 F. Supp. 1544 (D. Mont. 1992)	15
White Mountain Apache Tribe v. United States, 249 F.3d 1364 (Fed. Cir. 2001)	10
Statutes:	
Act of March 2, 1889, Ch. 405, § 2; 25 Stat. 888	1
18 U.S.C. § 1151	1
25 U.S.C. § 81	i, 14, 15
25 U.S.C. § 396	14
25 U.S.C. § 415	i, 14, 15

Cited Authorities

	Page
25 U.S.C. § 415(a)	1
28 U.S.C. § 1491	12
28 U.S.C. § 1505	12
42 U.S.C. § 4332	2
42 U.S.C. § 4332(C)	2
Rule:	
Sup. Ct. R. 10	16
Other Authorities:	
25 C.F.R. Part 2	7, 12
25 C.F.R. § 162.5	1
25 C.F.R. §§ 162.169-162.621	12
40 C.F.R. § 1501.3	3
40 C.F.R. § 1501.4	3
40 C.F.R. § 1501.4(b)-(c)	3
40 C.F.R. § 1508.9(a)(1)	3
40 C.F.R. § 1508.13	3
40 C.F.R. § 1508.27	3

Cited Authorities

Page

Bogert, *The Law of Trusts and Trustees* 346 (2d ed. 1980) 11

John D. Burns, *The Eight Million Little Pigs– A Cautionary Tale; Statutory And Regulatory Responses to Concentrated Hog Farming*, 31 Wake Forest L. Rev. 851 (1996) 2

Deloria, *American Indian Policy In The Twentieth Century*, University of Oklahoma Press 165 (1985) 8

Black Elk, *The Sacred Ways Of A Lakota*, Harper & Row 3-4 (1990) 8

The Rosebud Sioux Tribe ("Tribe") opposes the petition for writ of certiorari filed by Sun Prairie and it should be denied.

STATEMENT OF THE CASE

The Sun Prairie pork production facility is the latest of various projects that have been proposed to the Tribe by outsiders with no interest or stake in the Rosebud Indian Reservation other than generation of profits at the expense of the environment. Over the years, the Tribe has been targeted as a site for a massive commercial dump, a commercial chicken farm, and a feedlot for cattle. *See generally Rosebud Sioux Tribe v. United States*, 714 F. Supp. 1546 (D.S.D. 1989). Like proposals that the Tribe has successfully fended off in the past, the Sun Prairie production facility threatens to do grave and lasting damage to the Rosebud Indian Reservation.

The pork production facility to be constructed in this case was to be built upon 1,135 acres of land belonging to the Tribe in Mellette County, South Dakota. The area encompassed is part of the Rosebud Indian Reservation. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); Act of March 2, 1889, Ch. 405, § 2; 25 Stat. 888. All of the land is held in trust by the United States and is Indian country under 18 U.S.C. § 1151.

Any lease involving Indian trust land, such as involved in the present case, requires the approval of the Secretary of Interior ("Interior"), who typically acts through the BIA. *See* 25 U.S.C. § 415(a); 25 C.F.R. § 162.5. Lease approvals are actions subject to the requirements of the National Environmental Protection Act ("NEPA"), which requires

federal agencies to examine and inform the public about the environmental effects of proposed federal actions. *See* 42 U.S.C. § 4332; *Baltimore Gas & Electric Co. v. Natural Resources Defense Council*, 462 U.S. 87, 97 (1983); *South Dakota v. Andrus*, 614 F.2d 1190, 1194 (8th Cir. 1980). Under NEPA, to ensure that adequate consideration has been paid to environmental issues before an agency proposes a project, an agency must prepare an environmental impact statement ("EIS") whenever it proposes "major federal action significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C).

The sheer magnitude of the production facility is staggering. Once built, it would consist of 13 sites and the construction of 232 barns, most of which will house 2,000 animals each. App. 34, United States, *Sun Prairie v. Gover*, Nos. 2468 and 2471 (8th Cir.). Once completed, the facility would house 859,000 hogs per year, more than the human population of South Dakota, and require the use of 1,686,000 gallons of water daily, equivalent to one of the largest towns in South Dakota. *Id.* 32, 34. The manure and urine would be washed into ponds covering 550 acres of trust land. More waste would be produced by the hogs at the facility than all human residents in South Dakota. Once built, it would be one of the three largest pork production facilities in the United States. All of this to be built and maintained on pristine prairie covered with native grasses previously undisturbed from its original condition. Odor and run off from animal waste are among the chief contemporary threats to habitat and water quality in this country. *See generally* John D. Burns, *The Eight Million Little Pigs–A Cautionary Tale; Statutory And Regulatory Responses to Concentrated Hog Farming*, 31 Wake Forest L. Rev. 851 (1996).

A draft environmental assessment ("EA") concluded that the project would not have a significant effect[1] on the environment and was released for public comment at the end of June, 1998. App. 235, United States, *Sun Prairie v. Gover*, Nos. 2468 and 2471 (8th Cir.). The project generated a great deal of controversy in the community, and the majority of comments on the draft EA were negative. *Id.* 108-230. Many commenters specifically stated that the draft EA was inadequate and requested preparation of an EIS. Despite the negative comments and the controversy surrounding the project, BIA declined to issue an EIS and instead released the final EA on August 14, 1998. *Id.* 24. In many instances, the final EA concludes that the proposal could have significant impact but that these impacts would be mitigated. However, the manner in which mitigation could be accomplished was not always set out. *Id.* 80-95.

Based on the information in the EA, BIA issued a FONSI on the same day and concluded that no EIS was necessary.

---

1. The regulations implementing NEPA provide guidance to agencies on what degree of impact is "significant" and will thus require the preparation of an EIS. In determining whether an impact is significant, an agency should consider both the context of an action and its intensity. *See* 40 C.F.R. § 1508.27. The regulations implementing NEPA further provide that an agency may prepare an environmental assessment ("EA") to determine whether a proposed federal action will require an EIS. *See* 40 C.F.R. §§ 1501.3, 1501.4. The EA should be a concise document containing "sufficient evidence and analysis" for the agency to determine whether the proposed action will have a significant impact on the environment. 40 C.F.R. § 1508.9(a)(1); *see* 40 C.F.R. §§ 1501.4 (b)-(c), 1508.13. If the agency determines through the preparation of an EA that the proposed action will not have such an impact, the agency may decline to prepare an EIS after issuing a finding of no significant impact ("FONSI"). *See* 40 C.F.R. §§ 1501.4 (b)-(c), 1508.13.

On September 1, 1998, after release of the final EA, the Environmental Protection Agency ("EPA") sent the Tribe comments on the draft EA. It indicated "areas of concern including ground water and surface water protection, odor, incomplete information for analysis of impacts (direct, indirect, and cumulative), lack of a range of alternatives and insufficient defined monitoring and mitigation measures." App. 24-28, Intervenors, *Sun Prairie v. Gover*, Nos. 2468 and 2471 (8th Cir.). On October 15, 1998, EPA sent comments on the final EA, in which it elaborated on these and other problems and concluded again that the EA was "inadequate" and that the "FONSI was not supported by the information" therein. *Id.* 32.

The lease providing for construction of the hog production facility in this case was signed on September 8, 1998, and approved by the BIA Area Director on September 16, 1998. Sun Prairie's desire to enter into a lease with the Tribe without the attendant delay, expense, and uncertainty of an EIS was accomplished. Construction commenced on site 1. However, controversy over approval of the lease without an EIS continued unabated. A short time later, after approximately nine weeks of construction, on November 23, 1998, a coalition of environmental groups and members of the Tribe opposing the project filed a complaint in the United States District Court for the District of Columbia seeking to set aside approval of the lease alleging, *inter alia*, noncompliance with NEPA. While the proceedings continued in the District of Columbia suit, the Department of Interior was reconsidering its initial lease approval decision, even informing the Tribe in December that it would be withdrawing its approval. On January 27, 1999, before any briefs had been filed in the District of Columbia action, Assistant Secretary Gover sent a letter to the Tribe advising

that the EA did "not fully comply" with the requirements of NEPA and thus provided "an insufficient basis" for the FONSI. Accordingly, Interior concluded, the lease approval was "void for failure to fully comply with NEPA." On February 1, 1999, based on the decision to withdraw approval of the lease, the District of Columbia suit was dismissed without prejudice.

Two days later, on February 3, 1999, Sun Prairie instituted a suit in the United States District Court of South Dakota seeking, *inter alia*, a declaration that Interior lacked authority to withdraw approval of the lease and, even if it had such authority, the decision was arbitrary and capricious. Sun Prairie was not willing to await the preparation of an EIS, but rather was intent on undertaking any action that would allow it to proceed with construction and operation of the pork production facility. On March 2, 1999, the District Court for South Dakota entered an order granting a preliminary injunction against the United States and Intervenors from interfering with the construction or operation of the project. An appeal was taken to the Eighth Circuit by the United States and Intervenors. Sun Prairie continued to proceed with construction despite the pendency of the appeals. The Tribe on appeal was permitted to realign itself with the United States and Intervenors.[2] On February

2. Although the Tribal Council in 1998 supported the project, that was long before there was any critical environmental analysis of the project. The Tribe had no experience operating a hog farm, and its information about the project came in large part from Sun Prairie. It was the plan to get the project approved by the BIA in the quickest manner possible to avoid the "delay" and "inconvenience" occasioned by the preparation of an EIS. Ever since the Tribe came to realize, in 1999, the extent and sweeping nature of the environmental dangers posed by the project, it has consistently called for a stop to any further (Cont'd)

3, 2000, the preliminary injunction was made permanent. Appeals in June, 2000, were taken to the Eighth Circuit from that decision also. Sun Prairie continued to construct and operate the facility knowing full well the risks of doing so.

The Tribe instituted a suit against Sun Prairie in the Rosebud Sioux Tribal Court, as permitted under the lease at issue in this case, on April 24, 2001, seeking to prohibit any construction of site 2 because the Tribe had not received or approved plans for the site, had not approved the location, the anaerobic digesters were not operating properly, lack of compliance with Tribal laws pertaining to appropriation of water, and failure of Sun Prairie to provide the Tribe with all licenses and permits. Sun Prairie sought and was awarded a judgment on May 18, 2001, from the United States District Court of South Dakota, prohibiting the Tribe from maintaining the suit in Tribal Court.[3] An appeal by the Tribe and Intervenors was taken to the Eighth Circuit and a motion

---

(Cont'd)
construction. A referendum of the entire Tribe was conducted in 2000 where tribal members voted decisively against the project. Every Tribal Council since 1998 has been against it.

3. At a hearing held on May 11, 2001, in that proceeding, Judge Kornmann was uncomfortable with Sun Prairie's high-stakes gamble in this case as he made clear at 106:

> I have told Sun Prairie, I told them that in the temporary restraining order that I issued, that they are clearly proceeding at some risk. They are spending a lot of money there and if it turns out that I was wrong and the Court of Appeals reverses and says the lease was void, they have got a lot of money spent there and probably no way to recover it, at least in the face of long delays in going through the environment impact statement.

for a stay pending appeal, opposed by Sun Prairie, was denied on June 13, 2001. The appeal is still pending in the Eighth Circuit Court of Appeals. Sun Prairie continued to build while the action described in this paragraph was pending in Tribal Court, the District Court of South Dakota, and the Eighth Circuit Court of Appeals.

The decision of the Eighth Circuit to which the petition for writ of certiorari in this case is directed was filed on April 5, 2002.[4] Sun Prairie decries the unfairness of the decision and the amount of money that it has expended in constructing and operating the pork production facility up to the time of the Eighth Circuit decision. However, its argument rings hollow. Sun Prairie knew of the substantial opposition to the project on September 16, 1998, the date the lease was initially approved by the BIA.[5] On November 23, 1998,

---

4. The panel consisted of Judge Wollman, who was Chief Judge at the time of oral argument, and Judge Hansen, who was Chief Judge at the time that the opinion was written. App. A-2a n. 3, *Sun Prairie* petition. There were no dissents.

5. Sun Prairie indicates at 3 of its petition that no challenge or appeal was taken from the approval of the lease on September 16, 1998. Actually on September 4, 1998, five individuals, including one tribal member, sent a letter to the BIA Aberdeen Area Office asking for clarification of the procedures for objecting to the FONSI upon which the lease approval was based. *See* Add. 2, Brief of Rosebud Sioux Tribe, *Sun Prairie v. Gover*, Nos. 2468 & 2471 (8th Cir.). The letter cited 25 C.F.R. Part 2 and asserted those procedures applied to the FONSI; it also asked the BIA for guidance on the appeal process. The Area Director responded on September 17, 1998, indicating erroneously that the FONSI did not qualify for appeal under 25 C.F.R. Part 2. *Id.* at Add. 3. The local BIA offices were working with Sun Prairie and the Tribe. Sun Prairie proceeded with construction even though interested parties were trying and perhaps did file an appeal from the issuance of the FONSI.

a short nine weeks after lease approval, an action was filed to void the September 16, 1998, approval due to BIA's failure to prepare an EIS. Despite the glaring risks of constructing a massive hog farm in the face of a reasonable, even compelling NEPA challenge, Sun Prairie elected to continue construction.

Even after the decision of the Eighth Circuit on April 25, 2002, Sun Prairie continues in the courts. On August 14, 2002, it filed another action in the United States District Court of South Dakota, Central Division, against Gale Norton, Neal McCaleb, and the Rosebud Sioux Tribe seeking, *inter alia*, declaratory relief and money damages for constitutional violations, impairment of contract, and breach of the lease agreement.

Although members of the Tribe struggle economically, "Sioux culture has always been based on a strong interrelationship between the people and the land." Deloria, *American Indian Policy In The Twentieth Century*, University of Oklahoma Press 165 (1985). "We are earth people because we live close to our mother, the Earth. . . . (W)e are part of the fire and a part of the rock, or earth, and a part of the water and a part of the green, or living." Black Elk, *The Sacred Ways Of A Lakota*, Harper & Row 3-4 (1990). "(S)uccessful (economic) development is possible only if it builds on existing cultural values." Deloria, *supra* at 160. The environmental dangers presented by the pork production facility run contrary to the culture of the Tribe and cannot be ameliorated by the employment of small numbers of Indian people.[6]

---

6. Sun Prairie and the Tribe disagree on the number of Indian people regularly employed at the facility. The Tribe maintains that approximately 18 tribal members hold jobs, and many of those jobs are in manure management.

Sun Prairie places great emphasis on the Tribe's alleged need for economic development. However, the financial aspects of the lease agreement at issue in this case are as tragically one sided as its environmental and social aspects. Although the Tribe is contractually entitled to be paid 25% of the profits from the project, the Tribe has never received a penny from Sun Prairie except for a token payment that was offered and rejected. Though the Tribe maintains that Sun Prairie is obligated under the lease in question to pay the Tribe for the millions of gallons of groundwater that it has pumped to wash away hog waste, Sun Prairie has never paid a penny for the water used which has a market value in excess of $100,000 per year. The hog production facility at the heart of this case has cost the Tribe much more than it has received and that will be the situation indefinitely.

I. THIS CASE DOES NOT INVOKE ANY QUESTION OF FUNDAMENTAL IMPORTANCE TO THE DEVELOPMENT OF TRIBAL TRUST LAND.

In approving the lease at issue in this case, the BIA had a fiduciary duty to the Tribe to ensure that the construction and operation of the hog production facility in light of the known environmental risks did not damage or reduce in value the land. As trustee of the land, the BIA enjoyed wide discretion under trust principles to take such action as necessary to protect the land. This fiduciary duty has been longstanding and is of common knowledge among those who deal with Indian trust land. The BIA's first obligation was to the Tribe and the land that it held in trust.

The concept of federal trust responsibility to Indians lies on bedrock set forth in many cases evolving over a century and a half. In *Cherokee Nation v. Georgia*, 30 U.S.

(5 Pet.) 1 (1831), Chief Justice Marshall recognized the special status of Indian tribes under the law and concluded that "(t)heir relation to the United States resembles that of a ward to his guardian." *Id.* at 17. The trust principles first articulated in *Cherokee Nation v. Georgia*, *supra*, have been applied in many specific situations to establish and protect the rights of Indian tribes and individuals. *E.g.*, *United States v. Mason*, 412 U.S. 391 (1973).

More recently, in *Mitchell v. United States*, 445 U.S. 535 (1980) (*Mitchell I*), and *United States v. Mitchell*, 463 U.S. 206 (1983) (*Mitchell II*), this Court spoke again on the subject of trust responsibility. *Mitchell II*, *supra*, concluded, like in the present case, that the statute and regulations now before us clearly "establish a fiduciary relationship and define the contours of the United States' fiduciary responsibility." 463 U.S. 224. *See Navajo Nation v. United States*, 263 F.3d 1325 (Fed. Cir. 2001), *cert. granted*, 122 S. Ct. 2326 (2002); *White Mountain Apache Tribe v. United States*, 249 F.3d 1364 (Fed. Cir. 2001), *cert. granted*, 122 S. Ct. 1604 (2002).

The decisions of this Court reviewing the legality of administrative conduct in managing Indian property have held officials of the United States to "moral obligations of the highest responsibility and trust" and to "the most exacting fiduciary standards," *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942). Ordinary standards of a private fiduciary must be adhered to by federal agencies administering Indian property or federal programs. *Morton v. Ruiz*, 415 U.S. 199, 236 (1974); *Navajo Tribe v. United States*, 364 U.S. 320, 322-324 (Ct. Cl. 1966). And it is hornbook law that a trustee's competing interests do not excuse a breach of fiduciary duty. *Navajo Nation v. United States*, 263 F.3d 1325, 1332 (Fed. Cir. 2001). *See Brown v.*

United States, 86 F.3d 1554, 1557 (Fed. Cir. 1996) (fiduciary duty allegedly breached by BIA's failure to cancel lease).

The BIA had a trust responsibility to the Tribe to treat and protect its land the same as a private fiduciary would do. A trustee has a duty to protect trust property against damage or destruction. Bogert, *The Law of Trusts and Trustees* 346 (2d ed. 1980). In determining that the development contemplated by the lease in this case should not proceed, and that the protection of the land could not be assured based on the EA, the Assistant Secretary was carrying out his fiduciary duties. No chance could be taken that the waste lagoons were not properly built, that surface and ground water were not properly protected, that air would not be fouled, or that identified discrepancies and lack of information would not result in harm or catastrophe to the property. He withdrew his approval of the lease and invited the parties to resubmit a project that "can be designed, constructed and operated in a manner that is environmentally sound." App. E-69a, *Sun Prairie* petition. The Assistant Secretary possessed a wide range of discretion and his decision is entitled to considerable deference taking into account his trust responsibility to act in the best interest of the Rosebud Sioux Tribe.

Sun Prairie's position has been from the beginning unreasonable. Sun Prairie negotiated a lease agreement to build one of the largest hog production facilities in the nation on Indian trust land without the prior completion of an EIS, an unprecedented action by itself. After the lease approval was rescinded, Sun Prairie resisted the reasonable course of action which would have been to have an EIS completed and continued its unreasonable course by constructing and operating the facility knowing full well that the decision of

the district court enjoining the BIA from withdrawing its approval would be appealed. Not one single potential investor on an Indian reservation will be deterred by Sun Prairie's situation because Sun Prairie's actions were unreasonable and will not be repeated by other potential investors.

Private investors need not be hesitant to do business on the Rosebud Indian Reservation. A functioning tribal court of record operates. *Hornell Brewing Company v. Rosebud Sioux Tribal Court*, 133 F.3d 1087-1088 (8th Cir. 1998). The court is staffed by three full time law trained trial judges with an appeals court available. One member of the appeals court is a professor from the University of South Dakota Law School. *See In the Matter of the Estate of Crazy Horse v. Heileman Brewing Company*, 23 Indian L. Rptr. 6104 (1996) (Pommersheim). The Tribe itself enters into commercial contracts where it waives its sovereign immunity from suit and participates in different forums for the resolution of disputed claims. *Rosebud Sioux Tribe v. Val-U Construction Company*, 50 F.3d 560, 562 (8th Cir. 1995) (sovereign immunity waived by arbitration provision); *Rosebud Sioux Tribe v. A & P Steel, Inc.*, 874 F.2d 550, 552 (8th Cir. 1989) (corporate charter waived sovereign immunity).

Sun Prairie will not be without a forum if its petition is denied. First, it could have, under 25 C.F.R. Part 2, administratively appealed the BIA action in withdrawing approval of the lease and after any necessary appeal to the Interior Board of Indian Appeals eventually brought the action in United States District Court if required. 25 C.F.R. §§ 162.169-162.621. Second, if the action of the BIA violated the Constitution, statute, or regulation, it can bring an action for money damages in the United States Claims Court. 28 U.S.C. §§ 1491, 1505; *Bobula v. United States Department*

of Justice, 970 F.2d 854, 858 (Fed. Cir. 1992) (equitable relief sometimes available under Tucker Act when relief incidental to and collateral to claim for money damages). Third, Sun Prairie has, in fact, instituted another action in the United States District Court of South Dakota subsequent to the Eighth Circuit decision at issue in this case asking for certain declaratory and monetary relief.

The ruling addressed by the Sun Prairie petition will not undermine federal policy as suggested.

II. THE EIGHTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH THIS COURT'S PRECEDENT.

The decision of the Eighth Circuit at App. A-6a, *Sun Prairie* petition, correctly set out the standard to be applied in determining prudential standing:

> In addition to the constitutional requirements, standing also involves prudential limits on the exercise of federal jurisdiction. *Bennett*, 520 U.S. at 162. Prudential limits require a plaintiff to show the grievance arguably falls within the zone of interests protected or regulated by the statutory provision invoked in this suit. *Id.*

Sun Prairie, while agreeing that the court of appeals correctly stated the legal standard, claims that the court "misapplied the zone of interest test" and for that reason urges this Court to grant its petition for certiorari.[7]

---

7. The petition argues that the standing issue was not raised in the lower court. The standing issue was raised as soon as the Tribe became realigned. Standing requirements must be satisfied at every (Cont'd)

25 U.S.C. §§ 81 and 415 were designed to protect Indian tribes, not commercial entities seeking to utilize Indian lands and the concomitant freedom from state jurisdiction to generate profits. 25 U.S.C. § 81 specifically directs that no agreement be approved that violates a federal law such as NEPA; 25 U.S.C. § 415 gives the BIA virtually unfettered discretion to approve leases of Indian land and specifically directs that consideration be given to the effect on the environment of the uses to which the land will be subject. *See Davis v. Morton*, 496 F.2d 593, 596 (10th Cir. 1972) (EIS required prior to construction of housing development); *Manygoats v. Kleppe*, 558 F.2d 556, 559 (10th Cir. 1977).

Sun Prairie argues that the legislative history of 25 U.S.C. §§ 81, 396, and 415-415(d) establishes that, as a commercial enterprise, it possesses "at least some" interest arguably protected under those statutes. The interest identified apparently is its effort to further economic development and to prevent economic dislocation on Indian lands by unauthorized tribal or federal action. Neither the statutory language or legislative history shows that the statutes were enacted to protect and benefit anyone other than Indian tribes. No case discussing standing under those statutes has reached the conclusion urged by Sun Prairie. A trustee of Indian lands, such as the BIA under the facts of the present case, cannot have duties to protect the interest of a conflicting party.

(Cont'd)
stage of a federal court proceeding, from the initiation of the suit to its final review in this Court. When a standing issue is present, this Court has given serious attention to the matter even if not raised by the parties or passed upon by the courts below. *Lewis v. Casey*, 518 U.S. 343, 349 n. 1 (1996); *United States v. Hays*, 515 U.S. 737, 742 (1995); *Juidice v. Vale*, 430 U.S. 327, 331 (1977); and *O'Shea v. Littleton*, 414 U.S. 488, 493-498 (1974).

See Navajo Nation v. United States, 263 F.3d 1325, 1332 (Fed. Cir. 2001), *cert. denied*, 122 S. Ct. 2326. The BIA was required to protect the land to be affected by the hog production facility and entitled to withdraw the lease in order to guarantee that protection.

A review of 25 U.S.C. §§ 81 and 415 indicates not even a glimmer of intent that either statute was designed to protect commercial entities or place them within any zone of interest to be regulated or protected. This conclusion has been reached by the many cases addressing the same issue. *Schmit v. Int'l. Finance Mgmt. Co.*, 980 F.2d 498 (8th Cir. 1992); *W. Shoshone Bus. Council v. Babbitt*, 1 F.3d 1052, 1056 (10th Cir. 1993); *Webster v. United States*, 823 F. Supp. 1544, 1550 (D. Mont. 1992), *aff'd*, 22 F.3d 221 (9th Cir. 1994); *San Xavier Dev. Auth. v. Charles*, 237 F.3d 1149, 2252-53 (9th Cir. 2001).

While recognizing the holdings of the above cases, Sun Prairie maintains that the cases have no application once a lease has been approved. However, Sun Prairie cites no cases dealing with 25 U.S.C. §§ 81 or 415 to support its position. Moreover, even if Sun Prairie's analysis were correct, under the facts of this case it would be a distinction without difference. The lease in this case was approved on September 16, 1998. On November 23, 1998, an action was instituted in the District of Columbia to set aside the approval. There had been an EA conducted prior to lease approval where critical comments were made, including those of Intervenors, about the need for an EIS. On September 4, 1998, an administrative appeal had been attempted concerning the FONSI. The EPA had submitted its critical comments on the EA. Thus, while formal approval was given on September 16, 1998, Sun Prairie was on notice that the formal approval

was under attack and not likely to stand. Regardless of the approval given, Sun Prairie knew or should have known that the approval would be withdrawn and cannot now complain that it proceeded with construction at great risk. In view of the knowledge that Sun Prairie possessed, it could be treated the same as a party without lease approval.

REASONS FOR DENYING THE PETITION

First, Sun Prairie has not established that the Eighth Circuit decision conflicts either with the decision of this Court or of another circuit court. The decision being questioned is consistent with case law of other circuits. Second, there is no important question of federal law that should be decided by this Court. Economic development on Indian reservations is not threatened, and the unusual facts of this case are not likely to occur again in the future. Third, the Eighth Circuit decision correctly stated the rule of law pertaining to prudential standing and at most this case involves only a misapplication of a properly stated rule of law. Sup. Ct. R. 10. Fourth, there are factual issues pertaining to whether Sun Prairie knew or should have known that the BIA's lease approval was going to be withdrawn placing it in the same position as one without a lease. Fifth, the BIA made the correct decision in withdrawing approval of the lease until an EIS could be completed before construction of one of this country's largest hog production facilities. Review of the standing issue would not be a prudent use of judicial resources. Finally, although it is uncertain what decision the Assistant Secretary might make on a request for subsequent approval of the lease in question, if Sun Prairie has been damaged it has other forums available to make claim for money damages, including the suit currently pending in the United States District Court of South Dakota.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

TERRY L. PECHOTA
VIKEN, VIKEN, PECHOTA, LEACH,
AND DEWELL
1617 Sheridan Lake Road
Rapid City, SD 57702
(605) 341-4400

Attorney for Respondent
Rosebud Sioux Tribe